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Regulatory Jurisdiction on Indian Reservations in Montana

Mickale Carter

REGULATORY JURISDICTION ON INDIAN RESERVATIONS IN MONTANA

Mickale Carter*

I. INTRODUCTION

In Montana there are seven Indian reservation amounting to 8,347,185 acres,[1] or a little over nine percent of the state's total land area. Indian reservations are a unique form of federal reserve land.[2] Unlike other federal reserves, national forests and parks, for example, the purpose for which Indian reservations were formed was not for a particular land use. Indian reservations were set aside by the federal government for the "use and occupancy" of the designated Indian tribes. Also very commonly, treaties or agreements created the reservations, rather than the unilateral action of Congress or the executive.

This unique situation has resulted in three governmental entities having jurisdiction on Indian reservations: federal, state, and tribal. Adjudicatory jurisdiction of each governmental entity, both civil and criminal, has been hammered out in decisional and statutory law and generally each recognizes the legitimate jurisdiction of the other. This, however, is not the case in the area of regulation. When the tribe and the state compete for regulatory authority, there is no bright line test for which government should have jurisdiction, especially when either a non-Indian or reservation property owned by a non-Indian is involved.

Due to the vast coal and oil reserves located within the exterior boundaries of Montana's Indian reservations,[3] the determination of which entity shall regulate mineral development on Indian reservations is especially significant. For some time the state and federal governments were virtually the only rivals, the state, of course, bowing to federal authority. However, tribes are beginning to initiate regulatory schemes

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* B.A., M.Ed., J.D., Montana.

1. Profile of the Montana Native Americans, Bureau of Indian Affairs, Billings area office, Table J-2 at 189 (August 1974) (hereinafter Profile).

2. In 1964 Congress established the Public land Law Review Commission to recommend policy for the "public lands" which were defined as all lands in federal ownership except Indian lands. *See* 43 U.S.C. §§ 1391-1400 (1964) (presently omitted from the code because of the termination of the commission).

3. *See*, Richardson, *What Happens After the Lease is Signed*, AM. IND. J. 11 (February 1980). This paper will not discuss the complex area of Indian water rights. For a comprehensive discussion see, Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L. REV. 1 (1982).

and assert jurisdiction.[4] Which governments, state and tribal, have power to regulate, as well as when that power may be exercised to the exclusion of the other government's regulation, must be determined.

In the past three years the United States Supreme Court has decided several cases which, when read together, provide insight into this unsettled area. In order to understand the significance of these decisions a general understanding of Indian Law is necessary. The survey that follows will include a discussion of the relationship between the federal government and the tribes. An explanation of the varied types of land ownership on Indian reservation will be followed by a discussion of state adjudicatory jurisdiction over Indians and Indian Lands. This background discussion will also include an overview of the jurisdiction of Indian tribes over non-Indians.

II. FEDERAL TRIBAL RELATIONSHIP

A. *Indian Title to the Land*

Practically all the real estate acquired by the United States since 1776 was not purchased from Napoleon or any other emperor or czar but from the original Indian owners. What was acquired from Napoleon was not the land, but the power to govern and to tax, similar to the power that the United States gained with the acquisition of Puerto Rico or the Virgin Islands. After paying Napoleon fifteen million dollars for the cession of political authority over the Louisiana Purchase, the United States government proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for the lands they possessed which they were willing to sell.[5]

The payment for more than two million square miles purchased from the Indians commonly took the form of a myriad of commodities, special services, and tax exemptions. A conservative estimate would put the total

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4. Under the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 25 U.S.C. §§ 461-479 (1976), the tribes were given the power to adopt resource plans. *See, e.g.*, Burley, *Indian Lands—An Industry Dilemma*, 27B ROCKY MTN. MIN. L. INST. 1605 (1982). The Crow Tribe now imposes a severance tax on the severance of coal from its trust lands. *See*, Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 230 (1982). Also, the Indian Law Clinic of the University of Montana School of Law is presently preparing a resource regulation code for consideration by the Business Committee of the Rocky Boy's Reservation.
At least one commentator warns of the possibility of a shift in Indian policy, *see infra* text accompanying notes 34-72 as resources become increasingly scarce. Scarcity will result in tribal property becoming more coveted, and this may result in Congress "taking" tribal property. Newton, *The Judicial Role in Fifth Amendment Taking of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 248 (1982).

5. Cohen, *Original Indian Title*, 42 MINN. L. REV. 28, 35 (1947).

price paid in excess of 800 million dollars.[6]

Notwithstanding the federal government's willingness to purchase Indian interests in property, there remained until 1823 the question of the exact nature of Indian title. In *Johnson v. McIntosh*[7] Mr. Justice Marshall devised a scheme not unlike that of a feudal system.[8] The federal government had acquired title to all territory within its jurisdiction by the right of either discovery or conquest. The Indian tribes, by virtue of their native status, retained only the right of occupancy and use.[9] Thus the United States held the legal title to the land while the Indians held title to the beneficial use.

The federal government can extinguish the Indian title by treaty or by war. However, the Indian title can not be conveyed to a private party without the consent of the federal government. A non-consensual private sale of Indian lands gives the purchaser no valid title against the sovereign, the United States government.[10]

In 1938 the Supreme Court determined the scope of Indian title. The Court declared: "For all practical purposes the tribe owned the land. . . . The right of perpetual and exclusive occupancy of the land is not less value than full title in fee . . . ."[11] In that case the Court held that the Indian right to use and occupancy of the land included the ownership of the timber and mineral resources thereon. This holding was reiterated in *United States v. Klamath and Moadoc Tribes of Indians*,[12] with respect to Indian right to timber. As a result of these decisions, one commentator concluded that "the two decisions delivered a death blow to the argument that aboriginal ownership extends only to the products of the soil actually utilized in the stone age culture of the Indian tribes."[13]

The Supreme Court has not maintained its stance that tribes own the reservation resources. In a recent case the Supreme Court, although acknowledging the beneficial interest of the tribe, stated that the United States government owns the timber on Indian reservations.[14] It is noteworthy that the Court continues to recognize tribal interest in nontraditional uses of resources, in this case, the harvesting of timber.

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6. *Id.* at 35-36.

7. 21 U.S. (8 Wheat) 543 (1823).

8. Cohen, *supra* note 5, at 49.

9. Johnson v. McIntosh, 21 U.S. at 572-592. *See also* Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).

10. Johnson v. McIntosh, 21 U.S. at 572-592.

11. United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). "The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation." *Id.* at 118.

12. 304 U.S. 119 (1938).

13. Cohen, *supra* note 5, at 55.

14. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138 (1980).

B. *Treaties*

As white settlers encroached upon Indian country, treaties were used to remove Indian tribes from the path of ever expanding western civilization.[15] In exchange for their right of occupancy and use of aboriginal lands and peace, the federal government, pursuant to the provisions of treaties or executive orders, set aside parcels of land for the use and occupancy of the various Indian tribes. Some reservations were carved out of the tribe's aboriginal land, while others were created out of federal land which the tribe had not previously occupied. Along with the reservation of lands, the treaties promised the tribes other rights. Varying from treaty to treaty and from order to order, these rights included educational, health care, and general assistance benefits, along with the promise of agricultural and other technical assistance.[16]

Treaties are considered to be the supreme law of the land.[17] Although created by negotiation, treaty rights can be unilaterally abrogated by Congress. This power is based on the premise that treaties represent the political policy of the nation at the time they were made. As circumstances and thus policies change, Congress may then change the provisions of the treaty so that they will be in line with present policy.[18]

Much has been written concerning the unfair bargaining position of the Indian tribes[19] and the frequency of breach by the United States government.[20] In light of this unfairness, the Supreme Court has recognized that Indian treaties are not ordinary contracts.[21] "The Indian nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather treaties were imposed upon them and they had no choice but to consent."[22] "The United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side."[23]

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15. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth."—How Long is That?*, 63 CAL. L. REV. 601, 609 (1975).

16. *Id.* at 602-03.

17. U.S. CONST. art. VI.

18. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). This power, however, is not without restriction. For instance, treaty rights cannot be taken without just compensation. United States v. Creek Nation, 295 U.S. 103 (1935). Also there must be a clear expression of congressional intent to abrogate or modify the treaty. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

19. *See, e.g.*, Wilkinson & Volkman, *supra* note 15, at 608-12; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 62-63 (1982).

20. F. COHEN, *supra* note 19, at 63-64.

21. *See* D. GETCHES, D. ROSENFELT, & C. WILKINSON, FEDERAL INDIAN LAW 200-04 (1979).

22. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970).

23. Washington v. Washington State Commercial Passenger Vessel Ass'n, 443 U.S. 658, 675-76 (1979).

Recognizing the unequal bargaining position of the tribes, the courts have developed three canons of treaty interpretation:

(1) Ambiguous expressions must be resolved in favor of the Indian parties concerned;[24]

(2) Indian treaties must be interpreted as the Indians themselves would have understood them;[25] and

(3) Indian treaties must be liberally construed in favor of the Indians.[26]

C. *The Trust Relationship*

Judicial interpretation of treaties has resulted in the formulation of a trust relationship between the United States and the American Indian. Mr. Chief Justice Marshall in *Cherokee Nation v. Georgia*,[27] concluded that Indian tribes are "domestic dependent nations." This conclusion, precipitated from the nature of the dual title to the land discussed in *Johnson v. McIntosh*,[28] the original sovereignty of the Indian tribes, and their subsequent dependence upon the United States government for protection. In Mr. Justice Marshall's analysis, "[t]heir relation to the United States resembles that of a ward to his guardians."[29]

This first judicial formulation of the trust relationship has been expanded. The duty of the federal government, in conjunction with the broad power of Congress over Indian affairs,[30] has been characterized as "moral obligations of the highest responsibility and trust."[31] However, it should be remembered that Congress, even with this trust responsibility, can confiscate aboriginal Indian land by "merely transmut[ing] the property from land to money."[32]

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24. McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973).

25. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

26. *Id. See* Wilkinson & Volkman, *supra* note 15, at 617.

27. 30 U.S. (5 Pet.) 1, 17 (1831).

28. 21 U.S. (8 Wheat) 543 (1823). *See supra* text accompanying notes 7-10.

29. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17.

30. *See infra* text accompanying notes 33-36.

31. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). *See also* Wilkinson & Volkman, *supra* note 15, at 616 n.66.

32. Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968): "Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." The Supreme Court recently applied this "good faith test" in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), in which It found a taking of tribal property for which the Sioux Nation must be paid. For a discussion of the *Sioux Nation* Rule, *see* Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV.. 245 (1982).

But see Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (no compensation for taking of aboriginal lands). The Indian Claims Commission Act of 1946, 25 U.S.C. § 70-70v (1976), established a commission to adjudicate Indian claims. Takings of unrecognized Indian title have been found not to

D. *Plenary Powers of Congress*

Congress has plenary power over Indian affairs. Congressional enactments, supplemented by treaties and federal court decisions determine which governmental unit, tribal, state, or federal has jurisdiction in each circumstance. This congressional power follows from the trust relationship. The duty to care for Indians carries with it the power to legislate for them.[33] Settled in the first years of this century, the Supreme Court no longer questions congressional power to control and manage Indian land.[34]

Congress' plenary power also finds support in the Constitution. Although Indians are mentioned in the Constitution three times,[35] only the Commerce Clause specifically grants Congress power over Indians. Congress is authorized to "regulate commerce with foreign Nations and among the several states, and with the Indian Tribes."[36]

E. *Indian Policy*

Indian Law is a reflection of national Indian policy, which has undergone numerous shifts in direction in the course of American history.[37] The present policy, 1968 to the present, is one of encouraging tribal self-determination. It is premised on the notion that Indian tribes are basic governmental units. Consequently, during the 1970's and 1980's tribal governments have been affirmatively strengthened.[38]

In April of 1974 Congress declared its policy as it relates to the development of Indian resources. The Indian Financing Act[39] states: "It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to the point where the Indian will fully exercise

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give rise to liability for interest. *See* Alcea Band of Tillamooks v. United States, 341 U.S. 48 (1951). Also, commission awards are valued as of the date of the taking. Interest is allowed on only a small class of claims. *See* Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. U.L. REV. 26 (1970).

33. United States v. Kagama, 118 U.S. 375 (1886).

34. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (power to allot Indian land without tribal consent); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (power to enter into oil and gas leases on Indian land); Pine River Logging Co. v. United States, 186 U.S. 279 (1902) (power to arrange sale of timber).

35. Article one and the fourteenth amendment exclude "Indians not taxed" from the count for apportioning taxes and representatives to Congress among the states. U.S. CONST. art. I, § 2, cl. 3, amend. XIV, § 2.

36. U.S. CONST. art. I, § 2, cl. 3. *See generally* F. COHEN, *supra* note 19, at 207.

37. For a discussion of changes in Indian policy *see* F. COHEN, *supra* note 19, at 50-180.

38. *See* F. COHEN, *supra* note 19, at 180-206; T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 160-67 (1972); S. TAYLOR, A HISTORY OF INDIAN POLICIES 217-279 (1973); Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 163-65 (1977).

39. 25 U.S.C. §§ 1451-1543 (1976).

responsibility for the utilization and management of their own resources . . . ." This policy is consistent with the Supreme Court's interpretation, one year earlier, of the congressional policy and intent behind the enactment of the Indian Reorganization Act of 1934.[40] The Supreme Court stated that Congress intended to "rehabilitate the Indian economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[41]

F. *Tribal Sovereignty*

In an early case involving state power to regulate within an Indian reservation, Mr. Chief Justice Marshall looked behind the treaties and Indian Trade and Intercourse Acts to discern a congressional policy to safeguard tribal self government as well as land ownership.[42] Holding that the state was precluded from regulating activities within the reservation by the Supremacy Clause,[43] he defined Indian tribal status as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[44]

This notion of inherent sovereignty, shored up by preemption concepts,[45] has altered somewhat through the passage of time and changes in congressional policy toward Indians. Presently, the Supreme Court does not regard tribal sovereignty as a resolution of the issue of whether the state has jurisdiction to regulate within the reservation. Rather, it considers tribal sovereignty as a "backdrop against which the applicable treaties and federal statutes must be read."[46]

In 1978 the Supreme Court further modified tribal sovereignty concepts. It added the new consideration of the federal-tribal relationships and held that tribes only have those powers which are not inconsistent with their dependent status.[47] However, the Court continues to recognize the essence of inherent sovereignty.[48] The Supreme Court in 1978 stated that

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40. 25 U.S.C. §§ 461-479 (1976).

41. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting, H.R. REP. No. 1844, 73d Cong., 2d Sess. 1 (1934)).

42. Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

43. U.S. Const. art. VI, cl. 2.

44. Worchester v. Georgia, 31 U.S. at 557.

45. *See infra* text accompanying notes 124-130.

46. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

47. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *See also* Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Shark*, 63 MINN. L. REV. 609, 637 (1979); Note, *Indians—Jurisdiction——Tribal Courts Take Jurisdiction Over Non-Indian Offenders—Oliphant v. Suquamish Indian Tribe*, 537 WIS. L. REV. 569 (1979).

48. United States v. Wheeler, 435 U.S. 313, 328 (1978): "But our cases recognize that the

jurisdiction which is not delegated to state or federal courts *remains* with the tribe.[49]

The Supreme Court in *White Mountain Apache Tribe v. Bracker*,[50] aptly described the complexity of the present status of tribes:

> The status of the tribes has been described as " 'an anomalous one and of complex character,' " for despite their partial assimilation into American culture, the tribes have retained " 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' "[51]

III. Land Ownership on Indian Reservations

There are four kinds of land ownership within the reservations: land held in trust by the federal government for the tribe; land held in trust by the federal government for the individual tribal member; land owned in fee by a tribal member, or tribe; and land owned in fee by a non-member which includes non-Indians. For the purpose of determining power to regulate two categories are important: Indian land and non-Indian land. Indian land includes tribal and individual trust land as well as land on the reservation held in fee by a tribal member. All other land on the reservation is non-Indian land.

The creation of the reservation carried forward the separation of title to the property within the reservation. The federal government held bare legal title and the tribe held the beneficial title. The federal government held the land in trust for the use and occupancy of the respective tribes.[52] With a change in Indian policy, Congress passed the General Allotment (Dawes) Act of 1887.[53] Pursuant to this act, the land on the affected reservations was divided into small farm-sized tracts to be held by individual Indians. The land was to remain in trust for a certain time, usually for 25 years, and then fee simple title would vest in the individual Indian, taking the land out of trust.

Although land held in trust cannot be transferred to a private party without the consent of the federal government,[54] land held by the

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Indian tribes have not given up their full sovereignty."

49. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

50. 443 U.S. 136 (1980).

51. *Id.* at 142 (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973) which quoted United States v. Kagama, 118 U.S. 375, 381-82 (1886)).

52. *See supra* text accompanying notes 7-10.

53. 25 U.S.C. §§ 331-358 (1983).

54. Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823).

individual Indian in fee can be, and was, readily transferred. Congress encouraged further purchase of reservation land by non-Indians. In 1888 and for several years thereafter, Congress provided for the sale of "surplus lands" on various reservations. Surplus lands were lands deemed by Congress to not be needed for allotments.[55] As a result of this policy and the Indian sale or loss of land that was no longer in trust status, the total amount of Indian held land declined from 138 million acres in 1887 to 48 million in 1934.[56]

Another change in policy ended the allotment era. With the passage of the 1934 Indian Reorganization (Wheeler-Howard) Act,[57] all surplus land not yet sold was placed in trust for the benefit of the tribe. It also expressly ended the policy of allotment,[58] and the trust status of trust lands within the reservation was extended indefinitely.

There was initially some question as to whether the ownership of lands within the reservation by non-Indians *pro tanto* terminated the reservation with respect to that land. It was argued that this alienated land was no longer within the boundaries of the reservation. This issue was finally settled in *Mattz v. Arnett*.[59] The *Mattz* Court determined that the non-Indian purchase did not terminate the reservation status of the land.

The determinative factor, the Court stated, is whether Congress intended to terminate the reservation. Congressional intent must be clearly expressed when Indians are involved. The *Mattz* Court then established the standard for determining when congressional intent is clearly expressed. The intent, in this case to terminate, must either be "expressed on the face of the Act, or be clear from the surrounding circumstances and legislative history."[60]

On Montana's reservations, as of 1973, over one third of the land within the exterior boundaries of the reservations was owned by non-Indians, leaving about two thirds in trust. The proportion of types of ownership varies greatly from reservation to reservation. On the Rocky Boy's Reservation, for instance, virtually all the land is in trust, whereas, on the Fort Peck Reservation only about one half is in trust.[61]

A. *Montana's Disclaimer*

A Congressional Enabling Act, passed February 22, 1889, provided

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55. 25 U.S.C. § 348 (1983).
56. F. COHEN, *supra* note 19, at 138.
57. 25 U.S.C. §§ 461-479 (1976). *See* 25 U.S.C. § 463 (1976).
58. 25 U.S.C. § 461 (1976).
59. 412 U.S. 481 (1973).
60. *Id.* at 505. For an example of the application of this standard, *see* Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 314 (1982).
61. Profile, *supra* note 1, Table J-2 at 189.

for the establishment of the States of Montana, North Dakota, South Dakota, and Washington.[62] Section 4 of Montana's Enabling Act reads in pertinent part:

> And said convention shall provide, by ordinances irrevocable without the consent of the United States and the people of said states: . . . .
>
> Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, and the said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

Montana adopted the identical language in Montana's 1889 constitution.[63]

When Montana ratified a new constitution in 1972 this provision was therein incorporated:

> All provisions of the enabling act of Congress . . . including the agreement and declaration that all land owned or held by any Indian or Indian tribe shall remain under the absolute jurisdiction and control of the United States continue in full force and effect until revoked by the consent of the United States and the people of Montana.[64]

Although one might argue that the disclaimer precludes state personal jurisdiction over Indians, Montana's supreme court has held that this disclaimer is only applicable where the issue concerns Indian lands. It applies only to "proprietary interest therein and control thereof."[65] This pronouncement seems to preclude Montana's regulation of resource development on trust lands. However, the disclaimer is not applicable to land on the reservation held in fee by non-Indians.

Montana's disclaimer, nevertheless, has received little attention in the federal courts. It was not discussed at all in a recent case which considered Montana's power to tax the severance of coal from lands with mineral rights held in trust for the Crow Tribe.[66] The Supreme Court made short reference to the disclaimer in a case which dealt with state adjudication of

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62. 25 Stat. 676. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 321 N.W.2d 510, 511 (N.D. 1982), *cert. granted*, 103 S. Ct. 1872 (1983), *argued* (Nov. 29, 1983).

63. MONT. CONST. ORD. no. 1, § 2 (1889).

64. MONT. CONST. art. I.

65. Iron Bear v. District Court, 162 Mont. 335, 341, 512 P.2d 1292, 1296 (1973).

66. Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 230 (1982).

Indian water rights, but quickly dismissed its significance[67] in the context of adjudicatory power over the quantification of reserved water rights.

IV. AJUDICATORY JURISDICTION

The general rule is that adjudicatory jurisdiction not delegated by Congress, in its plenary capacity, to state or federal courts, remains with the tribe.[68] The relevant determination, then, is whether Congress has delegated the jurisdiction. Although stated simply, the application is rather complicated. Which court has jurisdiction in criminal matters is more certain than in civil matters. In both, the factors of situs and person are essential. Which court has jurisdiction depends upon: (1) whether the transaction or crime occurred on or off the reservation; and (2) whether an Indians only, non-Indians only, or individuals of both classes were involved.[69]

In 1953 Congress created a method, P.L. 280, whereby states could unilaterally assume jurisdiction over both civil matters and criminal activities on reservations no matter who the parties are.[70] The Indian Civil Rights Act of 1968[71] limited this practice by allowing state assumption of jurisdiction only if tribal consent is manifested by a majority vote of the enrolled tribal members. This requirement was strictly construed in *Kennerly v. District Court.*[72]

Montana did not acquire wholesale adjudicatory jurisdiction pursuant to the 1953 act. However, the Confederated Salish and Kootenai Tribe and the State of Montana have agreed, pursuant to P.L. 280, to have concurrent jurisdiction in all criminal matters and in eight enumerated areas.[73] There are no other tribal-state jurisdiction agreements. The discussion that follows is only applicable to states, like Montana, that did

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67. Arizona v. San Carlos Apache Tribe of Arizona, 103 S. Ct. 3201, 3212 (1983): The parties in this case have engaged in a vigorous debate as to the exact meaning and significance of the Arizona and Montana Enabling Act (footnote omitted). We need not resolve that debate, however, nor need we resort to the more general doctrines that have developed to chart the limits of state authority over Indians, because we are convinced that whatever limitations the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.

68. *See* Oliphant v. Suquamish Indian Tribe, 438 U.S. 191 (1978).

69. W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 84-156 (1981).

70. 18 U.S.C. § 1162 (1976). Congress granted the six mandatory P.L. 280 states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) civil and criminal jurisdiction over Indian reservations within the state's boundaries. The other states, optional states, were permitted to acquire similar jurisdiction.

71. *See* 18 U.S.C. §§ 1321, 1322, 1326 (1976).

72. 400 U.S. 423 (1971).

73. MONT. CODE ANN. §§ 2-1-301 to -307 (1983); Confederated Salish and Kootenai Tribes Law and Order Code, Ch. I, § 2, (3) and (4).

not assume tribal jurisdiction.

A. *Criminal Jurisdiction*

States have jurisdiction over both Indians and non-Indians who violate state law in the state but off the reservation. Federal statutes determine jurisdiction when the offense is committed on a reservation.[74] Although the statutes delegate jurisdiction to either federal or tribal courts, the Supreme Court has made an exception. When both the accused and the victim are non-Indians, or a non-Indian commits a victimless crime, the state has jurisdiction even though the situs of the crime was on the reservation.[75]

The Supreme Court later determined that when a non-Indian commits a crime on a reservation and an Indian is involved, the tribe does not have jurisdiction. Although Congress has never specifically denied tribal criminal jurisdiction over non-Indians, the Court reasoned, such jurisdiction would be inconsistent with the tribe's dependent status.[76] The Court determined that the tribe's power to restrict the personal liberty of United States citizens conflicts with the federal government's overriding interest in protecting its citizens "from unwarranted intrusions on their personal liberty."[77]

The Supreme Court, in a case that soon followed, clarified what criminal jurisdiction is consistent with the tribe's dependent status. The tribe, as an aspect of retained sovereignty, has the power to prosecute its members for tribal offenses.[78]

B. *Civil Jurisdiction*

Determination of jurisdiction over civil matters is more complicated. As in criminal jurisdiction, the state has jurisdiction if the claim arises in the state, off the reservation.[79] In 1832 the Supreme Court indicated the general rule that when both of the parties are Indians and the claim arises on the reservation, the tribe has exclusive jurisdiction.[80] Both state and

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74. 18 U.S.C. §§ 1152, 1153 (1976).

75. United States v. McBratney, 104 U.S. 621 (1882) (non-disclaimer state); Draper v. United States, 164 U.S. 240 (1896) (disclaimer state). In both *McBratney* and *Draper* a non-Indian killed a non-Indian on a reservation. Because only non-Indians are involved in a victimless crime states have jurisdiction by this same authority. W. CANBY, *supra* note 69, at 126.

76. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

77. *Id.* at 210.

78. United States v. Wheeler, 435 U.S. 313, 322 (1978). The sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within the part of sovereignty which the Indians implicitly lost by virtue of their dependent status.

79. International Shoe v. Washington, 326 U.S. 319 (1945).

80. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). "The Indian nations have always been considered as distinct, independent political communities." *Id.* at 559. "The Cherokee nation, then, is a

tribal courts may claim jurisdiction when the parties are not from the same class, i.e., one is an Indian and one is a non-Indian, and the situs of the activity was on the reservation.

The Court created a test such that when certain conditions are present, state jurisdiction over claims arising on the reservation is precluded. This test has been labeled the *Williams* or the infringement test.

The infringement test was conceived by the Supreme Court in *Williams v. Lee*.[81] A non-Indian attempted to sue an Indian in state court for a claim which arose on the Navajo reservation. A unanimous Court ruled that the state court had no jurisdiction. The Court reasoned that "absent governing Acts of Congress, the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be governed by them."[82] State jurisdiction would only be allowed where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[83] In so stating, the Court recognized the concept of inherent tribal sovereignty.

The Supreme Court has indicated that the *Williams* test deals principally with situations involving non-Indians. In that case both the tribe and the state could fairly claim an interest in asserting jurisdiction. The *Williams* test, It stated, was designed to resolve this conflict, allowing the state to protect its interests up to the point where tribal self-government would be affected.[84] When only Indians are involved a lesser state impact will preclude state assumption of jurisdiction.[85]

The Montana Supreme Court created a three prong test to determine whether the *Williams* test has been met and thus preclude state jurisdiction. The court directed Montana's district courts to not assume subject matter jurisdiction without first determining:

> (1) whether the federal treaties and statutes applicable have preempted state jurisdiction;
> (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and
> (3) whether the Tribal court is currently exercising jurisdiction or has exercised jurisdiction in such a matter as to preempt state jurisdiction.[86]

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distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . ." *Id.* at 561. The Montana Supreme Court has a three prong test it uses before it will preclude state jurisdiction. *See infra* text accompanying notes 86-89.

81. 358 U.S. 217 (1959).

82. *Id.* at 221.

83. *Id.* at 219.

84. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179-80 (1973).

85. Fisher v. District Court, 424 U.S. 382, 386 (1976): "[A]t best the same standard (the infringement test) must be met before state courts can exercise jurisdiction."

86. Iron Bear v. District Court, 162 Mont. 335, 346, 519 P.2d 1292, 1299 (1973).

The first and second prongs seem to be a restatement of the *Williams* test. The last prong seems to be more an interpretation of the second prong than a new element. Pursuant to this test, tribal self-government is infringed upon by the state assumption of jurisdiction only if the tribe is presently exercising or has exercised jurisdiction in that specific subject matter.

In applying this test, known as the *Iron Bear* test, the Montana Supreme Court will not find an infringement unless the tribal government has adopted specific procedures dealing with the subject matter involved.[87] This approach does not give the tribe the option of deciding to not legislate in a particular area, i.e., a tribe will not be allowed to legislate by default. This rationale seriously erodes the concept of tribal sovereignty.

The Supreme Court, in 1981, adopted a similar approach in a regulation case. In *Montana v. United States*,[88] the Crow Tribe claimed jurisdiction to regulate non-Indian hunting and fishing on non-Indian land. In ruling that the tribe lacked this jurisdiction, the Court held that the tribe had lost its regulatory interest because of the tribe's long standing acquiescence to nearly exclusive state regulation of such activities.[89]

Although tribal courts may claim jurisdiction over all civil actions arising on the reservation,[90] some tribal courts only claim jurisdiction when the defendant is a member of the tribe.[91] The Montana Supreme Court has a long standing policy that the state courts are open to all citizens, including Indians,[92] so the Indian plaintiff has a forum in Montana's courts

87. Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893 (1973), *cert. denied*, 419 U.S. 847 (1974) (divorce of two tribal members). It should be pointed out that regulatory jurisdiction on reservations is a federal question. A tribe can challenge a state's jurisdiction to enforce its regulations within the reservation in federal court. 28 U.S.C. § 1362 (1976). *See, e.g.*, Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 230 (1982).

88. 450 U.S. 544 (1980).

89. *Id.* at 566.

90. In *Kennerly*, 400 U.S. 423, 427 (1971) the Supreme Court discussed state extension of jurisdiction over action "by or against Indians arising in Indian Country." The tribe implicitly has jurisdiction. The issue addressed in *Kennerly* is when the state has concurrent jurisdiction. In Williams v. Lee, 358 U.S. 217 (1959), the Supreme Court determined that when the defendant is an Indian and the cause of action arose on the reservation the tribe has *exclusive* jurisdiction. In a recent Ninth Circuit decision that court expanded this holding stating: "We have recognized that the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation." R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983).

91. W. CANBY, *supra* note 69 at 144.

92. *See, e.g.*, Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952). The North Dakota Supreme Court has a very different view. In Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering P.C., 321 N.W.2d 510 (N.D. 1982), *cert. granted*, 103 S. Ct. 1872 (1983), *argued* (Nov. 29, 1983). The North Dakota Supreme Court found no state court jurisdiction to hear a claim by an Indian tribe against a non-Indian based on a civil cause of action arising on the reservation. North Dakota, like Montana, is a disclaimer state.

when the defendant is a non-Indian and the claim arises on a reservation. This is consistent with the *Iron Bear* rationale when the tribal court has not exercised jurisdiction.

V. REGULATORY JURISDICTION

Consideration of adjudicatory jurisdiction is relevant in the determination of regulatory jurisdiction because the courts apply the rationale from both criminal and civil cases to regulatory jurisdiction questions. If the rationale of the courts were represented as a Venn diagram, it would be a large circle representing regulatory jurisdiction considerations with two intersecting circles inside representing civil and criminal jurisdiction considerations.

Regulatory jurisdiction, like adjudicatory jurisdiction, is dependent upon person and situs. As with criminal and civil jurisdiction, the person is either a member Indian or a non-member which includes non-Indian and non-member Indians. For the sake of simplicity "non-Indian" will be used in this section to include non-Indians as well as non-member Indians.[93] Situs in the adjudicatory questions is either on or off the reservation. With respect to regulation, situs is the actual physical area on which certain activities are regulated. As discussed earlier, "on the reservation" is divided into Indian land and non-Indian land.

The state regulates activities off the reservation no matter who is the party. The tribe has exclusive regulatory jurisdiction, limited only by Congress,[94] over its members and over Indian land. This regulatory power, consistent with the tribe's semi-sovereign status,[95] has been held to include the power to regulate non-Indians. A tribe may regulate through taxation, licensing, or other means the activities of non-members who enter consensual relations with the tribe or its members.[96] The tribe, for example, may impose a severance tax on oil and gas produced on tribal trust property even when the producer is a non-Indian.[97] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on non-trust land.[98] In a recent landmark decision the Ninth Circuit held that tribal power to regulate carries with it the power to enforce the regulation.[99]

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93. The distinction between Indians and member-Indians was clearly expressed in Washington v. Confederated Tribes of Colville Indians, 447 U.S. 134, 152 (1980).

94. 25 U.S.C. § 476 (1976).

95. *See* United States v. Wheeler, 435 U.S. 313 (1978).

96. Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905).

97. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982).

98. Fisher v. District Court, 424 U.S. 382, 386 (1976); Montana Catholic Mission v. Missoula County, 200 U.S. 118, 128-29 (1906); Thomas v. Gay, 169 U.S. 264, 273 (1898).

99. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 293 (1982): "To

States have no power to tax Indian trust lands either held for the tribe or an individual.[100] Also, states have no power to tax property held in fee by a tribal member when its situs is on the tribe's reservation.[101] These restrictions on state power are reinforced by Montana's disclaimer.[102] States, in addition, cannot tax the income of tribal members if the income is earned on the tribe's reservation.[103]

However, non-members, both non-Indian and non-member Indians, residing on a reservation are not exempt from state taxation.[104] The power of states to tax non-members includes the power to tax income earned on the reservation[105] as well as real property located on the reservation.[106]

Both the state and the tribe have power to tax non-Indians doing business with a tribe or with tribal members on the reservation.[107] Indeed both the state and the tribe claim jurisdiction to regulate non-trust land on the reservation as well as non-Indians who engage in activity on the reservation. On a case-by-case basis the courts determine whether jurisdiction is concurrent (with the most restrictive controlling in areas of conflict) or whether one governmental entity should be allowed exclusive jurisdiction.

Because so much land on Montana's reservations is non-Indian land and because development of mineral resources likely will be accomplished by, or at least in conjunction with, non-Indians, both state and tribal regulations will surely be applied. Developers, as well as both governments, will need to know when one government has exclusive jurisdiction. This will be especially important when the tribal and state regulations are in conflict.

Regulation of resource development includes both taxation, e.g., severance and gross proceeds, and the actual control of the development,

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hold that Indian tribes cannot exercise civil jurisdiction over non-Indians would . . . reduce to a nullity the Supreme Court's repeated assertion that Indian tribes retain attributes of sovereignty over their territory, not just their members."

100. The Kansas Indians, 72 U.S. (5 Wall) 737 (1867).

101. Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

102. Montana's 1889 disclaimer, *see* text accompanying notes 62-63, indicated that Montana had no power to tax Indian held lands unless two conditions were present. First, the Indian must have "severed his tribal relations" and, second, the land must have been taken out of trust. 25 Stat. 676. This provision was carried forward into Montana's 1972 Constitution. *See* text accompanying note 64. MONT. CONST. art. I. It follows then, that land held in fee by a tribal member is not taxable by the state because the first prong of the test is not met.

103. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

104. Washington v. Confederated Tribe of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980).

105. Kahn v. Arizona State Tax Comm'n, 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed*, 411 U.S. 941 (1973).

106. Utah & Northern Ry. v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 69 U.S. 264 (1898).

107. Washington v. Confederated Tribe of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980).

e.g., licensing, environmental protection regulations, and lease conditions. The courts have set out the criteria for determining when regulatory jurisdiction should be concurrent or exclusive. Because the courts make no distinction between the kinds of regulation, all types of regulations, including taxation, will be lumped together in the delineation of the court's analysis.

The discussion that follows will set out court considerations when determining tribal regulatory jurisdiction over non-Indians. Criteria for state regulatory jurisdiction over non-Indians on reservations will be similarly examined. The final section will present the courts' rationale for allowing exclusive jurisdiction.

A. *Court Considerations in Determining Tribal Regulatory Jurisdiction Over Non-Indians*

1. *Inherent Tribal Sovereignty*

The Supreme Court has stated that although the tribes have been divested of criminal jurisdiction over non-Indians by necessary implication,[108] civil regulatory power has not been likewise divested.[109] "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[110]

However there are situations in which the sovereign power of the tribe would be diminished such that the tribe would be precluded from regulation in a particular area. A clear statement of the circumstances which would divest a tribe of the power to regulate non-Indians was compiled by the Tenth Circuit.

When faced with the question of whether the Jicarilla Apache Tribe had jurisdiction to levy a severance tax on oil and gas produced by non-Indian lessees on trust lands, the Tenth Circuit considered the tribe's regulatory powers which are an attribute of sovereignty.[111] First determining that inherent tribal sovereignty extends to both members and territory, the Tenth Circuit acknowledged the limitations on tribal sovereignty. Citing two Supreme Court cases which considered criminal jurisdiction, the court found three circumstances which would limit a tribe's sovereign power: (1) if the powers of self-government were voluntarily relinquished by treaty; (2) if Congress in the exercise of its plenary authority over tribes

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108. United States v. Wheeler, 435 U.S. 313 (1978).

109. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

110. Montana v. United States, 540 U.S. 544, 565 (1980).

111. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980).

divested the tribe of the power; or (3) if the exercise of the power would be inconsistent with the superior interests of the United States as a sovereign nation.[112]

The presence of any one of these three conditions would preclude the tribe from exercising jurisdiction. This finding must be made on a case-by-case basis, determined by the relevant treaties and federal laws. The court would have to ascertain whether the tribe had been divested of the precise power required for jurisdiction over non-Indians in the specific area of regulation at issue.

In making the determination of whether either treaties or acts of Congress divested the tribe of power, the courts construe both liberally, with doubtful expressions being resolved in favor of the Indians.[113] The statute or treaty must on its face preclude tribal regulation, or the legislative history must show an express or implied congressional intent to do so.[114]

The courts have read the third condition quite narrowly. Only three areas have been identified. A tribe may not: convey trust land without the consent of the federal government; deal directly with foreign nations; or exercise criminal jurisdiction over non-Indians.[115] The Supreme Court has also pointed out an important distinction: "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the State."[116]

2. *General Tribal Regulatory Jurisdiction Over Non-Indians*

The general areas of tribal regulatory jurisdiction over non-Indians have been delineated by the Supreme Court. Absent any of the three situations discussed above, the tribe will have jurisdiction in these areas. The areas are lumped into two categories: the regulation of non-Indians doing business on the reservation; and the regulation of non-Indians whose activities impact tribal self-government.

The *Montana v. United States*[117] court described tribal power as

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112. *Id.* at 541 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978)); Wheeler v. United States, 435 U.S. at 313, 323 (1978).

113. Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (quoting, Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)).

114. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 547 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

115. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 541 (1980) (citing Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823)); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

116. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

117. Montana v. United States, 450 U.S. 544, 565-566 (1980).

follows: "A tribe may regulate, through taxation, licensing, or other means the activities of non-members who enter consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements . . . ." A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on non-Indian lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

In addition, the courts have acknowledged that the power of taxation is "essential to the very existence of self-government, is an attribute of sovereignty and extends generally to all that is within that government's territorial jurisdiction."[118] This is reinforced by the position of the Department of Interior: "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation . . . . [T]his power may be exercised over members of the tribe and over non-members . . . ."[119]

The power of the tribe to regulate is based on sovereignty, drawn from both the power to tax and the power to exclude non-Indians, and is not derived from the consent of those being regulated.[120] Being so derived, a tribal regulation can not be overturned because the person being regulated has not consented to the regulation.[121] This is especially important when a non-Indian is being regulated by a tribal government because typically, even if the non-Indian is a resident of the reservation, he has no say in tribal government. Participation in tribal government is usually limited to tribal members.

B. *Court Considerations in Determining State Regulatory Authority Over Non-Indians On a Reservation*

1. *The Infringement Test*

The courts' considerations are derived from and are expansions of the *Williams* infringement test. The "absent acts of Congress" aspect has expanded to include federal policy and pervasive federal schemes.[122] The

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118. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 591 (1980) (quoting, McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 428-29 (1819)).

119. Powers of Indian Tribes, 55 I.D. 14, 46 (1934).

120. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894, 906 (1982): "Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority."

121. *See, e.g.*, Cardin v. De La Cruz, 671 F.2d 363, 367 (9th Cir. 1982).

122. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983); Rice v. Rehner, 103 S. Ct. 3291 (1983) (a state can require an Indian trader who is federally licensed to obtain a state liquor license); Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), *cert. denied*, 103 S.

"infringement on tribal self government" aspect, when applied to regulation also includes a consideration of federal policy. In the case of civil adjudicatory jurisdiction, if the state assumption of jurisdiction would violate either prong of the test, state jurisdiction would be precluded. However, with regulatory jurisdiction even if only one of the two prongs is violated, the state's jurisdiction may prevail if the state can show that it has sufficient state interest in the particular regulation.[123]

2. *Preemption of State Jurisdiction*

A state is without jurisdiction if its authority is preempted by traditional principles of preemption. Because of the unique federal/tribal relationship, the courts have chosen to not limit preemption analysis in the context of Indian law to the traditional notions of preemption. Preemption in the context of Indian law does not require an express congressional statement.[124] The state regulation is preempted if the federal scheme is so pervasive that there is no room for state involvement. "Pervasive federal scheme" embraces federal regulation of resource development and can even be as minimal as a federal licensing requirement.[125]

The courts' preemption analysis has all but swallowed the infringement on tribal self-government concepts. Tribal and federal interests are considered as one and the same. In the preemption analysis, heavy weight is given to the federal commitment to tribal sovereignty and self-determination. In fact the Supreme Court has acknowledged what it calls "Congress' overriding goal" to encourage "tribal self sufficiency and economic development."[126] State authority is precluded when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[127]

Ct. 230 (1982); White Mountain Apache Tribe v. Bracker, 443 U.S. 136 (1980).

123. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2390 (1983); Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1113-14 (1981), *cert. denied*, 103 S. Ct. 230 (1982); White Mountain Apache Tribe v. Bracker, 443 U.S. 136, 144-45 (1980).

124. White Mountain Apache Tribe v. Bracker, 448 U.S. 135, 144 (1980) (citing Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965)).

125. *See, e.g.*, Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1111-12 (1981), *cert. denied*, 103 S. Ct. 230 (1982) (Montana's proceeds and severance tax will be preempted if the tribe can show that the taxes substantially thwart the policies of the Mineral Leasing Act of 1938, 25 U.S.C. § 396a-d (1976), which include revitalization of tribal government and tribal economic development.); White Mountain Apache Tribe v. Bracker, 443 U.S. 136, 148 (1980) (State tax on a motor carrier license based on gross receipts was preempted because of federal regulation of tribal harvesting on the reservation.); Central Machinery Co., v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) (Arizona sales tax was preempted because persons doing business on the reservation are required to have a federal license.).

126. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2386-87 (1983) (quoting White Mountain Apache Tribe v. Bracker, 443 U.S. 136, 143 (1980)).

127. Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico, 102 S. Ct. 3394,

In order to preclude state regulation, then, the Court must make the threshold determination that the regulation is preempted by either explicit federal law or by a pervasive federal scheme. A finding of preemption under the pervasive federal scheme analysis, however, is not determinative. Cautious not to preempt legitimate state regulation, the courts make an additional inquiry when preemption is found using this non-traditional, broader scheme. The courts determine whether the state interest at stake justifies the assertion of state authority.[128] If the state's regulation is found to be justified, the state retains jurisdiction.

Whether the state regulation is justified is determined by balancing the state interests in the regulation against the tribal interest in not having the regulation. A state has a legitimate governmental interest, for example, in raising revenues when the tax is directed at off reservation value and when the taxpayer is the recipient of state services.[129] However, the state's mere "interest in acquiring additional revenues is weak in comparison with the tribe's right to the bounty from its own land" and would not in that circumstance justify state imposition of a tax.[130]

C. *Court Considerations in Determining When Regulation Should Be Exclusive: The Balancing Test*

To determine if tribal or state regulations should be exclusive the courts make a particularized inquiry into the nature of the state and tribal interests at stake.[131] Two conditions must be present before the courts will allow exclusive jurisdiction. First, the governmental interests in the regulation must be disparate. One government must have a strong interest while the other's interest is weak. Second, the concurrent application of the regulations must result in an adverse affect on the regulation by the government with the strong interest.[132] This adverse affect may be direct, e.g., make the hunting and fishing regulatory scheme a nullity[133] or

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3402 (1982) (quoting Hines v. Davidowitz, 312 U.S. 42 (1941)).

128. *See supra* note 123.

129. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980). "[S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 152 (1980) (quoting Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965)).

130. Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1117-23 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 230 (1982). *See infra* note 134. *See also*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

131. *Bracker*, 448 U.S. at 145.

132. *Id.*

133. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2388 (1983). Because of the decline in the sale of timber the Mescalero Apache Tribe decided to create another source of tribal income. In conjunction with the federal government, the tribe built up its fishing and hunting resources

indirect, e.g., force the tribe to choose between imposing its tax, thereby discouraging coal mining and or losing lease money; or foregoing tax revenues.[134]

A tribe has a strong interest in taxation if the value marketed is generated on the reservation by activities in which the tribe has a significant interest, or when the tribe is raising revenues for essential governmental services and the taxpayer is a recipient of those services.[135] A tribe has a strong interest in regulation of its natural resources when it has committed substantial time and resources to their development as a source of tribal income,[136] or the resource is a mineral resource.[137]

A tribe has a weak interest in the regulation if it bears no clear relationship to tribal self government or internal relations.[138] Also, the tribe's interest is weak if it has traditionally accommodated itself to the state's nearly exclusive regulation in that area.[139]

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as a result of a comprehensive fish and game management program. It then raised revenues by the sale of hunting and fishing licenses to non-members.

The rub came when the State of New Mexico, in which the reservation lies, began enforcing its hunting and fishing regulations against non-Indians leaving the reservation. The hunting and fishing regulations of the tribe and the state were not coordinated. The tribe allowed hunting when the state prohibited it.

The Court reasoned that to allow the concurrent application of the two regulatory schemes would essentially eviscerate the tribes scheme. Because the state's scheme is more restrictive (with concurrent application of regulations, the most restrictive prevails), it would essentially supplant tribal regulation. It is significant to note that most of the reservation is owned in fee by non-Indians.

134. Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1116 (1981), *cert. denied*, 103 S. Ct. 230 (1982). Montana imposed a severance and a gross proceeds tax on all coal mined and sold in Montana. This included coal held in trust for the Crow Tribe both on and off the reservation. The main lessee of the tribe's coal reserves in 1975 paid $31 million to the State of Montana but only $8 million to the tribe in royalties. The next year, the tribe enacted its own coal tax code and sought a declaratory judgment as to the validity of the state's tax.

Although normally both governmental entities are allowed to impose similar taxes, *see* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (tax on cigarettes), in this case the Ninth Circuit Court felt that the burden may be too great for the tribe. Montana's tax, it stated, could, as a practical matter, force the tribe to choose between foregoing its own tax revenues or impose its tax on the lessee and discourage coal mining. This would result in decreased royalties as well as diminished revenues from the tax.

135. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155, 156-157 (1980).

136. *See supra* note 133. *See also* White Mountain Apache Tribe v. Barker, 443 U.S. 136 (1980) (timber resource).

137. *See supra* note 134.

138. Montana v. United States, 450 U.S. 544, 564 (1981). *See infra* note 139.

139. *Id.* The Crow Tribe of Indians decided to prohibit non-Indian hunting or fishing on the reservation. The Big Horn River which flows through the reservation was a well known trout fishing river and had been stocked by the State of Montana since 1920.

After determining that the title of the bed of the river was held by the State of Montana, the Supreme Court held that the state has exclusive jurisdiction over hunting and fishing by non-Indians on fee land on the reservation. It concluded this because the "[t]ribe has traditionally accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation."

As stated above, the state, as with the tribe, has a strong interest in taxation if the tax is directed at off reservation value and the taxpayer is the recipient of state services.[140] The state has a weak interest in the mere generation of revenues.[141]

VI. CONCLUSION

The extent of each tribe's enterprising activities will not only determine its own regulations, but will also delimit the state regulations which will be allowed to impact on each reservation. Clearly, the tribes have power to regulate the development of resources on trust land. Equally clear, tribes may regulate through licensing, taxing and other means, non-Indians who enter a consensual relationship with the tribe to develop the tribe's natural resources.

Tribes may regulate the development of resources on non-Indian land on the reservation to the extent that the regulation protects the health and welfare of the tribe.[142] Tribes may also regulate activities on non-Indian land in order to protect tribal economic security and political integrity.[143] Tribal regulations on non-Indian land can range from environmental protection,[144] to zoning,[145] to sanitary standards.[146] However, a tribe may only levy a tax on non-Indians if the revenue is used to provide a service of which the non-Indian taxpayer is a recipient.[147]

A state is certainly preempted from regulating non-Indians in the development of tribal resources if the federal government has specifically excluded state involvement. Absent this direct preemption, state taxes will attach to non-Indian developers of tribal mineral resources *unless* the tribe has a conflicting taxing scheme in place. The state may regulate non-Indians hunting and fishing on non-Indian land *unless* the tribe has a comprehensive management program designed to develop its hunting and fishing resources. Likewise, states may be allowed to regulate resource

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140. *See supra* note 129 and accompanying text.

141. *See supra* note 130 and accompanying text.

142. Montana v. United States, 450 U.S. 544, 566 (1981). *See, e.g.* Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 293 (1982) (tribal building health and safety code upheld); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 314 (1982) (tribal regulation of docks on Flathead Lake upheld).

143. *Montana*, 450 U.S. at 566. *See, e.g.*, Mescalero Apache Tribe v. New Mexico, 103 S. Ct. 2378 (1983) (not only upheld tribal hunting and fishing recreation of non-Indians but precluded state regulation thereof on the reservation).

144. *See, e.g.*, Lummi Indian Tribe v. Hallauer, No. C79-682R (W.D. Wash. Feb. 1982) (required non-Indians to hook up to tribal sewer).

145. *See, e.g.*, Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982).

146. *See, e.g.*, Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 103 S.Ct. 293 (1982).

147. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir.).

development on non-Indian land on the reservation *unless* the tribe has a comprehensive regulatory scheme applicable to that non-Indian land.